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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

DON M. MARTIN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether a criminal defendant may appeal a district court's dismissal of an indictment "without prejudice," when the dismissal is based upon the court finding prejudicial violations of defendant's Fifth and Sixth Amendment rights and when there is no practical means to prevent the same violations in a second investigation or trial.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Don M. Martin ("Martin") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reproduced in Appendix A. It is reported at 682 F.2d 506 (5th Cir. 1982). The Order of the United States District Court for the Northern District of Texas (Abilene Division) is reproduced in Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on August 13, 1982. An Order extending time to file a Petition for Writ of Certiorari to and including November 11,

1982, was entered by Associate Justice Byron R. White on October 4, 1982. This Court has jurisdiction under 28 U.S.C. § 1254(1) (1976).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . .

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense.

28 U.S.C. § 1291 (1976) provides, in pertinent part:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . .

STATEMENT OF THE CASE

1. Summary.

Unlike other criminal cases that concern pretrial motions to dismiss, this case involves a district court order *terminating* the proceedings because it found prejudicial violations of a criminal defendant's fundamental rights under the United States Constitution.[1] The trial court dismissed the indictment here because it was based on the illegal disclosure of confidential and privileged information by Martin's attorney to the government. The

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[1] *Compare United States v. Hollywood Motor Car Co., Inc.*, —— U.S. ——, 102 S.Ct. 3081 (1982) (denial of motion to dismiss because of alleged vindictiveness by prosecution).

trial court held that the use of this information was plainly improper:

> When a lawyer testifies as to his communications with his client, as did [the lawyer] in this case, with no waiver from the client of the privilege, and at the same time gives testimony in behalf of his own interests and against those of his clients, such actions amount to a deprivation of effective assistance of counsel to the clients and a resulting denial of these clients' Fifth and Sixth Amendment rights.[2]

The dismissal of the indictment was "without prejudice" to the government's right to reindict if it could do so without the evidence provided by Martin's attorney. Martin appealed from the decision to the United States Court of Appeals for the Fifth Circuit. Despite the parameters for appellate jurisdiction established by this Court in *Perlman v. United States* (*"Perlman"*)[3] and *Helstoski v. Meanor* (*"Helstoski"*),[4] the Fifth Circuit dismissed the appeal for want of jurisdiction.

2. Facts Concerning the Indictment Against Martin.

In 1973, Martin created his own company, DOMA Corporation ("DOMA"), to engage in the purchase and sale of petroleum. In order to complete both the sale of his interest in an existing corporation and the formation of his own, new enterprise, Martin obtained the legal counsel of his first cousin and personal attorney, Reagan Martin, a practicing lawyer in Dallas, Texas.[5]

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[2] Appendix B at 13a (citation omitted).

[3] 247 U.S. 3 (1918).

[4] 442 U.S. 500 (1979).

[5] Vol. IV at 123-24. This citation and other citations to the record below are made by volume and page number (or exhibit number) to the official Record on Appeal to the United States Court of Appeals for the Fifth Circuit. Vol. IV is the transcript of the proceedings before the trial court.

From DOMA's inception, Reagan Martin was its Chairman of the Board, Vice-President and Secretary-Treasurer. In addition, Reagan Martin acted as its corporate counsel, a position he occupied until 1980. In this role, Reagan Martin maintained the corporate records and provided legal advice.[6] During the same period, he acted as personal counsel to Don Martin.[7]

In 1977, the United States Department of Energy ("DOE") initiated an audit of DOMA, which lasted into 1979.[8] One of the transactions reviewed by DOE involved Caprock Services Company, Inc. ("Caprock"), a wholly-owned subsidiary of DOMA. In July 1978, a customer of Caprock complained that Caprock had delivered one grade of oil to it and then billed it for a higher quality oil. Martin called his attorney, Reagan Martin, and told him, "[W]e have got a problem, and I think you ought to come out here and talk to me about it."[9] Reagan Martin agreed and went to DOMA's headquarters in Abilene, Texas. Martin explained the situation to Reagan Martin and asked his advice. It was ultimately decided that Reagan Martin would approach the disgruntled customer by himself to settle the problem.[10]

In the spring of 1979, DOE referred the Caprock transaction to the United States Department of Justice for criminal investigation. Because of this, Martin, Reagan Martin, and the two corporations became targets of prospective criminal proceedings. For this reason, they retained joint defense counsel.

Beginning in August 1979, four meetings were held involving joint defense counsel, Martin, and Reagan Mar-

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[6] Vol. IV at 124-25.

[7] Appendix B at 9a, 12a; Vol. IV at 159-60.

[8] Ex. 12.

[9] Vol. IV at 129.

[10] Ex. 4 at 33.

tin "for the purpose of preparing the joint defense of all of the parties with respect to the anticipated criminal charges."[11] The meetings not only involved exchanges concerning privileged facts, key document identification and analysis, identification of important witnesses, and tactical decisions; of even greater significance, Reagan Martin used these meetings to interrogate Martin about the particulars of the transaction underlying the criminal investigation.[12]

After the first three joint meetings, Reagan Martin voluntarily offered to give the government information concerning the Caprock transaction—including information gained from his clients in 1979 and during the joint defense meetings. As the district court later found, Reagan Martin's purpose was to plead innocence for himself and point the finger of blame at his clients. Needless to say, Reagan Martin did not seek, let alone obtain, his clients' consent to give the government confidential and privileged information. A United States Federal Bureau of Investigation memorandum of June 4, 1980 documents Reagan Martin's attempt to exculpate himself and steer the government toward his clients:

> Reagan advised that the DOMA—Cosden transaction had been arranged and carried out without his knowledge. He stated that Don Martin would have been the person responsible for setting up this operation. . . .
>
> He advised that he is well aware of the difference in crude oil and refined products; however, he was not aware that DOMA was dealing in refined prod-

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[11] Appendix B at 10a. The district court's opinion notes only the last three meetings. The first was held on August 9, 1979. Ex. 1A at 2-3.

[12] Vol. I at 398; Ex. 1B at 2.

ucts, as their basic function was to purchase and haul crude oil.[13]

The government knew that Reagan Martin had been Martin's personal attorney and counsel to the corporations under investigation.[14] Nonetheless, the government did nothing to discourage Reagan Martin's cooperation. To the contrary, the government continued to meet with him and later arranged to have him testify before the grand jury.[15]

Reagan Martin agreed to appear before the grand jury, obviously in a further effort to save himself and seal his clients' fate. Again, he did not seek, let alone obtain, any waiver from his clients. Nonetheless, he again disclosed confidential and privileged information.[16]

Reagan Martin's efforts bore fruit. On February 2, 1981, a nine-count mail fraud indictment was filed against Martin, DOMA, and Caprock.[17] Reagan Martin, the counsel who provided the prosecution and the grand jury with an ear into the defense camp, was not indicted.

3. The Proceedings Below.

On March 2, 1981, Martin (and the corporate defendants) moved to dismiss the indictments against them because of violations of their Fifth Amendment rights to due process of law and against self incrimination and Sixth Amendment right to effective assistance of counsel. In essence, the motion relied on Reagan Martin's im-

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[13] Ex. 5 at 2.

[14] Ex. 1A at 4-5.

[15] Ex. 4; Appendix B at 11a. It is noteworthy that Reagan Martin attended at least one additional joint defense meeting [on July 23, 1980] after he first conferred with the government.

[16] Ex. 4 at, *e.g.*, 8-9, 21-30, 33-36.

[17] Vol. IV at 1.

proper disclosure of confidential and privileged communications to the government.

The district court granted the motion and dismissed the indictment against the defendants. The court order was based on a finding that Reagan Martin's disclosures had been a principal basis for the grand jury's decision to indict Martin (as well as the corporate defendants):

> There is no doubt the defendants have been prejudiced by this abrogation of the attorney-client privilege and conflict of interest especially since the communications revealed to the government and the grand jury resulted in the return of the indictment. . . . The unique turn of events . . . has denied them fundamental rights under the Constitution.[18]

This dismissal was "without prejudice" to the government's right to reindict, if it could do so without using Reagan Martin's testimony. Defendants moved for reconsideration of the district court order, asking that the dismissal be "with prejudice." On June 5, 1981, the district court denied that motion.

Martin appealed to the United States Court of Appeals for the Fifth Circuit, arguing that a dismissal with prejudice was the only appropriate remedy for the constitutional violations found by the trial court. The government also appealed the dismissal of the indictment but later withdrew their appeal. Six months later, just after Martin (and the other defendants) filed their brief on the merits of the appeal, the government filed a motion to dismiss the defendants' appeal. This motion was considered by the Fifth Circuit along with the appeal itself.

On April 20, 1982, while the motion and appeal were pending, Martin was reindicted in the District Court for the Northern District of Texas. Neither the corporate defendants nor Reagan Martin were indicted.

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[18] Appendix I' at 13a (citations omitted).

On June 2, 1982, the district court entered an order staying all proceedings under the new indictment, pending resolution of the Fifth Circuit appeal. The district court issued the stay because it would be "a definite miscarriage of justice" to compel Martin to defend himself under the new indictment while simultaneously prosecuting the appeal, which, if successful, would negate the need for a trial.[19]

On August 13, 1982, the Fifth Circuit dismissed petitioner's appeal for want of jurisdiction.[20] According to the appellate court, the district court's decision was neither a final decision within the meaning of 28 U.S.C. § 1291 nor a collateral order within the meaning of *Cohen v. Beneficial Industrial Loan Corp.* (*"Cohen"*).[21]

On August 27, 1982, petitioner moved for a stay of mandate. The motion was denied on September 3, 1982, and the mandate issued on that date.

On September 14, 1982, petitioner filed a motion in the district court for a further stay of proceedings in that court pending resolution of this petition. The motion was granted on October 5, 1982.

REASONS FOR GRANTING THE WRIT

1. Summary.

This case presents a significant federal question never previously addressed by this Court: whether a criminal defendant may appeal a district court's dismissal of an indictment "without prejudice," when the dismissal is based upon the court finding prejudicial violations of defendant's Fifth and Sixth Amendment rights and when there is no practical means to prevent the same violations

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[19] Order of Chief Judge Halbert O. Woodward, United States District Court for the Northern District of Texas (June 2, 1982).

[20] *United States v. Martin*, reprinted in Appendix A.

[21] 337 U.S. 541 (1949).

in a second investigation or trial. This issue goes to the sanctity of a client's confidential communications with his attorney. Its resolution will therefore have a profound influence on the scope of protection that courts accord a fundamental constitutional privilege.

This is *not* a case presenting the issue whether a defendant must suffer the inconvenience of a trial in order to vindicate a constitutional right. A court has already determined that Martin's rights have been violated, and the only issue here is the appropriate remedy. Martin claims that the dismissal must be "with prejudice" because there is no practical means to prevent further violations in the forthcoming proceedings before the trial court. Thus, his constitutional rights would again be violated—even if he is acquitted.

Helstoski and *Perlman* should have guaranteed Martin a right to appeal the question whether the district court's order provided adequate relief for proven violations of his constitutional rights. The Fifth Circuit, however, ignored those decisions and denied Martin the right to appellate review. In reaching this conclusion, the Fifth Circuit misconstrued this Court's holding in *Parr v. United States* (*"Parr"*)[22] and departed from principles of appellate jurisdiction established by this Court. Review by this Court is therefore needed to restore the validity of those principles.

2. The District Court's Order Is A Final Decision.

The first principle of appellate jurisdiction involved here concerns the meaning of "final decisions" as that term is used in 28 U.S.C. § 1291. A final decision in a criminal case is usually a conviction and a sentence. *Berman v. United States*, 302 U.S. 211, 212-13 (1937). It is well established, however, that there are situations in which a decision can be final even though there is neither a conviction nor a sentence. *See, e.g., United*

[22] 351 U.S. 513 (1956).

States v. Mock, 604 F.2d 336, 339 (5th Cir. 1979) (defendant can appeal denial of motion urging collateral estoppel if the denial is a "final rejection of a criminal defendant's claim" and would, if reversed, completely bar prosecution); *United States v. Wood*, 295 F.2d 772, 777 (5th Cir. 1961), *cert. denied*, 369 U.S. 850 (1962) (government can appeal denial of motion to restrain state prosecution since the denial was "a final disposition of the Government's claimed right to prevent the prosecution"). These and other decisions reflect this Court's view that "the requirement of finality [in Section 1291] is to be given a 'practical rather than a technical construction'." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 171 (1974).

By any practical standard, the district court order at issue here is a final decision under Section 1291. Here, like a defendant urging collateral estoppel under *Mock* and the government in *Wood*, Martin claims that certain rights—his Fifth Amendment rights to due process and against self incrimination and his Sixth Amendment right to effective counsel—will be lost if further prosecution is not barred. Martin is not simply trying to avoid the inconvenience of trial; he is seeking an appropriate remedy from a court order which terminated a case because his constitutional rights had been violated.[23] Martin's appeal, in short, is not to determine whether his rights have been violated but whether the court provided an adequate remedy for proven violations.

Martin contends that the remedy provided by the district court is not adequate. There is no practical way by which any court can divest the government of privileged information it acqured from Reagan Martin; and there

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[23] The issuance of this order distinguishes this case from *United States v. Hollywood Motor Car Co., Inc.*, —— U.S. ——, 102 S.Ct. 3081 (1982) and other similar appeals of interlocutory orders, because in those cases, the lower court *rejected* the claim of constitutional violation and was prepared to move forward with the trial.

is no practical way by which any court can prevent the further use and disclosure of that privileged information in a trial. This point was explained by the Third Circuit when it dismissed a prosecution *with prejudice* because the government had improperly acquired information relating to privileged attorney-client communications:

> The disclosed information is now in the public domain. Any effort to cure the violation by some elaborate scheme, such as by bringing in new case agents and attorneys from distant places, would involve the court in the same sort of speculative enterprise which we have already rejected. Even if new case agents and attorneys were substituted, we would still have to speculate about the effects of the old case agents' discussions with key government witnesses.

United States v. Levy, 577 F.2d 200, 210 (3d Cir. 1978). Here, as in *Levy*, Martin claims that the only effective remedy for proven violations is to dismiss the indictment with prejudice.[24]

The Fifth Circuit may ultimately reject the approach in *Levy* and similar cases on the remedy issue.[25] How-

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[24] It should be noted that the reindictment of Martin was presided over by the same prosecutor who presented Reagan Martin's illegal testimony to the original grand jury and argued against dismissal of the first indictment.

[25] In addition to *Levy*, *see United States v. Morrison*, 449 U.S. 361, 365 n.2 (1981) (if "there was continuing prejudice which could not be remedied by a new trial or supression [then] . . . more drastic treatment [is] called for"); *Hoffa v. United States*, 385 U.S. 293, 308 (1966) (citation omitted) ("It is possible to imagine a case in which the prosecution might so pervasively insinuate itself into the counsels of the defense as to make a new trial on the same charges impermissible under the Sixth Amendment."); *United States v. Valencia*, 541 F.2d 618 (6th Cir. 1976) (dismissal of an indictment, with prejudice, would be appropriate if the intrusion into the defendants' attorney-client privilege prejudiced them); *United States v. Bowers*, 517 F. Supp. 666 (W.D. Pa. 1981); *United States v. Peters*, 466 F. Supp. 364 (S.D. Fla. 1979).

ever, there should be no doubt about the right to appeal that issue. Certainly, the right to appeal would exist in a civil case if a party complained about the relief afforded after a determination of liability. There is no reason to treat this criminal case any differently.

The Fifth Circuit, however, held that the district court's order in this case was not final under Section 1291, because there was no conviction. But none of the cases cited by the Fifth Circuit involved a factual situation like the one presented here. More specifically, none of the cases concerned the dismissal of an indictment because of prejudicial violations of the defendant's constitutional rights.

The most significant case cited by the Fifth Circuit is *Parr v. United States*, *supra*. In that case the district court granted Parr's motion to transfer his criminal case to another division within the same judicial district. Shortly after this transfer, the government obtained a new indictment against Parr for the same offenses in a different judicial district and moved for leave to dismiss the first indictment. The motion was granted over Parr's vigorous opposition, and Parr appealed to the Fifth Circuit. The appellate court dismissed Parr's appeal because he was not aggrieved by the dismissal and, therefore, the order appealed from was not final. This Court affirmed.

Parr is completely different from the case at issue here. There the dismissal was based on a prosecutor's voluntary request; here the dismissal was based on court findings that Martin's constitutional rights had been violated. In *Parr* there could be no harm to the defendant until he was convicted; here, in contrast, Martin will necessarily have to suffer further disclosures of confidential and privileged communications—even if he is later acquitted. In short, *Parr* is based on the broad discretion accorded to federal prosecutors in initiating criminal proceedings. Martin's case, in contrast, is based on the

need to vindicate and prohibit further violations of Martin's constitutional rights. For this reason, *Parr* does not control the determination of whether the district court's order in this case is final.[26]

3. The District Court's Order Is An Appeable Collateral Order.

The second principle of appellate jurisdiction involved here concerns the kind of collateral order that can be appealed. Even assuming, *arguendo*, that the district court's order here is not final under the traditional Section 1291 analysis, it is plainly final under *Cohen*. Though sometimes cited as an "exception" to Section 1291, *Cohen* is actually an application of the Court's practical view of Section 1291's "finality" requirement. Specifically, these cases involve certain "collateral orders" considered "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." 337 U.S. at 546.

In order for a collateral order to be appealable, three factors must be met. First, the trial court decision must fully dispose of the question. Second, the decision must be collateral to the question of defendant's innocence or guilt. Third, the decision must involve an important right which would be irreparably lost if review were deferred. The district court's order in the instant case meets each of these three criteria.

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[26] The two other cases cited by the Fifth Circuit on this point involved facts similar to those confronting the Court in *Parr*. *See United States v. Arzate*, 545 F.2d 481 (5th Cir. 1977); *United States v. Lanham*, 631 F.2d 356 (4th Cir. 1980), *cited in* Appendix A at 3a. Neither of these later decisions add anything to the discussion on finality provided in *Parr*.

If *Parr* can be viewed as broadly holding that a dismissal of an indictment is *never* a final decision, even when based on constitutional violations, the case is plainly at odds with *Helstoski* and *Perlman*, *see infra* at 14-16, and should be overruled to that extent.

As acknowledged by the Fifth Circuit, *Cohen's* first factor is met in this case, because "the district court conclusively determined that the defendants' constitutional rights were violated." [27]

The second factor—that the dispute be collateral to the issue of guilt or innocence—is also satisfied. Martin sought dismissal with prejudice at the trial court level because his attorney, with the active encouragement of the government, disclosed privileged communications. In none of his pleadings did Martin discuss his guilt or innocence. The district court's opinion similarly contains no discussion of the merits. In short, the issue here is Martin's right to communicate freely with his attorney—not whether he committed any alleged crime.

In these respects, then, this case is virtually identical to *Helstoski*. In *Helstoski*, a Congressman moved the district court to dismiss an indictment because it relied on congressional speech that was privileged under the Speech and Debate clause. The district court denied Helstoski's motion, and he petitioned the Court of Appeals for a writ of mandamus directing the district court to dismiss the indictment. The appellate court declined to issue the writ. On certiorari, this Court held that the dismissal order was an appealable collateral order and that Helstoski should have taken a direct appeal to the Court of Appeals. This Court stated that the question was whether congressional speech was privileged from disclosure—not whether the Congressman was guilty of the crime charged. The Court added that, if a Congressman or Senator "is to avoid exposure to [being questioned for acts done in either House] and thereby enjoy the full protection of the Clause, his . . . challenge to the indictment must be revieweable before . . . exposure [to trial] occurs." 442 U.S. at 508, *citing Abney v. United States*, 431 U.S. 651, 662 (1977). In other words, because the

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[27] *United States v. Martin*, Appendix A at 4a.

communications in *Helstoski* were privileged, the defendant was afforded a right to appeal in order to preserve the sanctity of the privilege.

Like *Helstoski*, Martin's case involves the protection of privileged communications. Like the defendant there, Martin is concerned that any trial will result in violations of his communications privilege. And, like the defendant in *Helstoski*, Martin should have a right to pursue an appropriate remedy in an appeal.

The Fifth Circuit, however, stated that Martin's complaint was "intertwined with guilt" because, like Fourth Amendment motions to suppress, "the issue here ultimately concerns what evidence will be used against the defendant . . ."[28] But the Fifth Circuit did not cite, let alone discuss, *Helstoski*—a case which necessarily distinguishes Fourth Amendment pretrial motions from those motions designed to protect the sanctity of privileged communications. If it had confronted that case, the Fifth Circuit would have been compelled to conclude that the issue of privilege presented here, as in *Helstoski*, is entirely collateral to the issue of guilt or innocence.

Lastly, the third factor in *Cohen*—that the decision involve an important right which would be irreparably lost if review is deferred—is clearly present here. As noted above, there is no practical way to divest the government of the information it acquired from Reagan Martin and, therefore, no way to prevent the use and disclosure of privileged information at trial. Deferral of appellate review until trial will not only fail to prevent these disclosures; it may result in an absolute denial of *any* appellate review since Martin could be acquitted.

To this extent, Martin's posture is comparable to that of an individual who seeks to quash a subpoena that would, if honored, allow access to privileged information.

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[28] *United States v. Martin*, Appendix A at 4a.

For example, if a grand jury subpoena is directed to a third-party custodian of another party's documents, the owner is unable to refuse compliance and test the issue in collateral contempt proceedings. For this reason, this Court has, for over sixty years, held that the owner may appeal a district court's order directing third-party custodians to disclose documents over which the owner claims a privilege. *Perlman v. United States, supra.*

In *Perlman*, this Court reviewed a district court order granting the government's access to appellant's documents, which were in the custody of the clerk of the court. The lower court's order did not terminate the litigation. Nonetheless, this Court held that the order was final and could be appealed by the potential defendant, who claimed the documents were privileged under the Fourth and Fifth Amendments. The Court rejected the government's contention that the lower court order was interlocutory and, therefore, not subject to appeal:

> The second contention of the Government is somewhat strange, that is, that the order granted upon its solicitation was not final as to Perlman but interlocutory in a proceeding not yet brought and depending upon it to be brought. In order words, that Perlman was powerless to avert the mischief of the order but must accept its incidence and seek a remedy at some other time and in some other way. We are unable to concur.

247 U.S. at 13. *See In re Berkley & Company*, 629 F.2d 548 (8th Cir. 1980) (an owner of privileged documents can appeal an interlocutory order which requires a third-party custodian to disclose the documents to a grand jury).

Martin is in the same position as the appealing parties in *Perlman* and its progeny. In effect, he seeks to prevent the government from disclosing information that is privileged to him.

Martin's right to appeal here is not affected by this Court's recent decision in *United States v. Hollywood Motor Car Co., Inc., supra.* That case involved the defendants' motion to dismiss an indictment because of alleged prosecutorial vindictiveness. The Court said that, absent conviction, defendants were not aggrieved and, therefore, could not appeal the denial of the motion. Unlike *Helstoski* and this case, then, the Court in *Hollywood Motor Car* did not have to confront the constitutional violations that had occurred and/or would occur even if the defendants were acquitted. Like the claim in *Helstoski*, then, Martin's claim is "one that must be upheld prior to trial if it is to be enjoyed at all." *United States v. Hollywood Motor Car Co., Inc., supra,* 102 S.Ct. at 3085.

CONCLUSION

For these reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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